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Supreme Court, U.S.
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No. 94-1126

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

In re:
ONE TIMES SQUARE ASSOCIATES LIMITED PARTNERSHIP,

Debtor.

ONE TIMES SQUARE ASSOCIATES LIMITED PARTNERSHIP,

Petitioner,

vs.

BANQUE NATIONALE DE PARIS,

Respondent,

NORMA ORTIZ,

Trustee.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT BANQUE NATIONALE DE PARIS

JOHN S. KINZEY*
JOHN P. CAMPO
TIMOTHY W. WALSH
LEBOEUF, LAMB, GREENE & MACRAE L.L.P.
125 West 55th Street
New York, New York 10019-5389
(212) 424-8000

**Counsel of Record for Respondent Banque Nationale de Paris*

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QUESTIONS PRESENTED

1. In light of the Court's recent decision to deny the petition for a writ of certiorari in *Boston Post Road Ltd. Partnership v. Federal Deposit Insurance Corp. (In re Boston Post Road Limited Partnership)*, 21 F.3d 477 (2d Cir. 1994), *cert. denied*, __ U.S. __ (No. 94-442, Jan. 17, 1995), does the Second Circuit's *per curiam*, unpublished opinion in this case, in which the Second Circuit merely followed *Boston Post Road* on an essentially identical set of facts, present an issue of sufficient importance to warrant consideration on the merits by this Court?

2. Given the fact that the bankruptcy reorganization plan proposed by the Debtor in this case did *not* separately classify the "deficiency" claim of its undersecured mortgagee, does this case present an appropriate occasion for the Court to consider the arguments, advanced by the Petitioner, that such separate classification is mandated by the Bankruptcy Code?

3. Where the bankruptcy court found, in factual findings that were affirmed as not "clearly erroneous," that the Debtor's separate "classification" of one group of its unsecured creditors "serves no legitimate purpose" and was done "*solely* to create a separate, non-insider impaired class guaranteed to accept the [Reorganization] Plan" (A50, emphasis supplied), should this Court consider the Debtor's arguments that are premised on the contrary factual proposition that "overriding legitimate reasons for separate classification" had been demonstrated at the confirmation hearing?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENT BANQUE NATIONALE DE PARIS

Respondent Banque Nationale de Paris ("BNP" or the "Bank") submits this brief in opposition to the petition of One Times Square Associates Limited Partnership ("OTS" or the

"Debtor") for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

STATEMENT

1. This case arises from the bankruptcy court's decision to lift the "automatic stay" imposed by the Bankruptcy Code to allow the Bank to proceed with a foreclosure sale of OTS's only significant asset, a commercial office building that was mortgaged to the Bank to secure a loan that has been in default since 1991.

2. The Bank's predecessor in interest[1] loaned OTS approximately $28 million. This loan was secured by a mortgage on the Debtor's real property located at One Times Square in New York City. OTS defaulted on the loan, and in October, 1991, the Bank initiated foreclosure proceedings against OTS in the New York Supreme Court.

3. On March 11, 1992, OTS filed a bankruptcy petition pursuant to Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of New York. Pursuant to Section 362 of the Bankruptcy Code, this filing automatically stayed the Bank from proceeding with its foreclosure action. Thereafter, the Bank and OTS entered into a stipulation in the bankruptcy court that allowed the Bank to go forward with the foreclosure action through the entry of judgment with the understanding that the Bank would return to the bankruptcy court to seek further relief from the automatic stay before conducting a foreclosure sale. A

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[1] The loan to OTS was originally made by BNP's subsidiary, Banque Arabe et Internationale d'Investissement ("BAII"). During the course of the litigation, BAII assigned the loan to BNP. For convenience, BNP and BAII are interchangeably referred to as the "Bank," except where the context requires otherwise.

judgment of foreclosure and sale was ultimately entered in the state trial court on April 8, 1993.

4. In July, 1992, OTS filed a proposed plan of reorganization (the "Plan") in the bankruptcy court. Although OTS argues in this Court that, as a matter of law, the Bank's undersecured "deficiency" claim must be placed in a separate "class" of creditors, the Plan proposed by OTS did *not* classify the Bank's claim separately from OTS's general class of unsecured creditors. Instead, OTS grouped the Bank's deficiency claim with other unsecured creditors, and sought to classify separately the claims of two advertising "signage" companies whose existing contractual arrangements with OTS were being rejected and renegotiated as part of the proposed Plan.

5. The Bank opposed confirmation of the Debtor's Plan on a number of grounds and moved for complete relief from the automatic stay. The bankruptcy court conducted a 10-day evidentiary hearing, and held that the proposed Plan did not meet the requirements of the Bankruptcy Code for three separate reasons.

6. First, the bankruptcy court found that OTS's scheme for the classification of creditors was improper because the separate classification of the signage companies "serves no legitimate purpose in the financial restructuring of the Debtor" and was done "solely to create a separate, non-insider impaired class guaranteed to accept the Plan." (A50). Second, the bankruptcy court held that the proposed Plan was not "fair and equitable" to the Bank because it did not provide for payments to the Bank with a present value equal to the $19 million stipulated value of the Bank's security interest in the Debtor's real property, as required by Section 1129(b)(2)(A) of the Bankruptcy Code. Third, the bankruptcy court held that the additional capital which OTS's partners were proposing to inject into the reorganized Debtor was too insubstantial to

allow the partners to retain their equity interests under the purported "new value" exception to the Bankruptcy Code's "absolute priority" rule.

7. Having denied confirmation on these three alternative grounds, the bankruptcy court granted the Bank's motion to lift the automatic stay so the Bank could proceed with its foreclosure sale.

8. On November 5, 1993, OTS moved for reconsideration or reargument of the bankruptcy court's decision. Appended to its motion papers was a so-called "Alternative Plan" of reorganization that, *inter alia*, proposed for the first time to place the Bank's unsecured deficiency claim in a separate class of creditors. On November 17, 1993, the bankruptcy court entered an order adhering in all respects to its original decision. OTS has never submitted a proposed disclosure statement for the Alternative Plan; never asked its creditors to vote on it; and never sought a confirmation hearing, all of which are prerequisites under the Bankruptcy Code to determining whether the Alternative Plan can be confirmed.

9. OTS appealed the bankruptcy court's decision to the United States District Court for the Southern District of New York. Because the denial of confirmation of the Debtor's original Plan did not foreclose the possibility that the Debtor might ultimately confirm the Alternative Plan or some other reorganization plan, the bankruptcy court's denial of confirmation, in itself, was interlocutory and non-appealable.[2] However, the notice of appeal properly brought before the district court the issue of whether the bankruptcy court abused its discretion by granting the Bank relief from the automatic

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[2] *See In Re Mcorp Fin. Inc.*, 139 B.R. 820, 822 (S.D. Tex. 1992); *Collier on Bankruptcy* ¶ 3.03, 3-197 (15 Ed. 1993).

stay.[3] On March 31, 1994, the district court affirmed the bankruptcy court's order lifting the automatic stay on the grounds that OTS had adopted a creditor classification scheme for the improper purpose of "gerrymandering" its creditors' vote on confirmation of the Plan. The district court found it unnecessary to reach the two alternative grounds for denying confirmation on which the bankruptcy court based its order.

10. OTS further appealed to the United States Court of Appeals for the Second Circuit. The court of appeals affirmed on September 27, 1994 in an unpublished, *per curiam* opinion of no precedential effect. The court of appeals based its affirmance in this case on its recent holding in *Boston Post Road Ltd. Partnership v. Federal Deposit Ins. Corp. (In Re Boston Post Road Ltd. Partnership)*, 21 F.3d 477 (2d Cir. 1994), *cert. denied*, __ U.S.__ (No. 94-442, Jan. 17, 1995), in which the Second Circuit adopted the prevailing majority view that separate classification of creditors' claims is improper when undertaken for the purpose of securing the affirmative vote of an "impaired" class of claims to allow a debtor to "cram down" the confirmation of its plan of reorganization.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

1. In its decision in the *Boston Post Road* case, the Second Circuit joined the Third, Fourth, Fifth, Sixth, Eighth and Eleventh Circuits in holding that in bankruptcy reorganization cases, creditors' claims "may not be separately

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[3] *See Lomas Fin. Corp. v. Northern Trust Co. (In re Lomas Fin. Corp.)*, 932 F.2d 147, 151 (2d Cir. 1991); *Sonnax Indus. v. Tri Component Prods. Corp. (In re Sonnax Indus. Inc.)*, 907 F.2d 1280, 1284 (2d Cir. 1990).

classified solely to engineer an assenting impaired class" to allow confirmation by "cramdown" of the debtor's plan of reorganization. 21 F.3d at 482.[4] In the case now before this Court on the pending petition, the Second Circuit merely applied the rule of *Boston Post Road*, based on the bankruptcy court's factual finding that OTS had separately classified the two signage companies' claims solely to "gerrymander" the confirmation vote to obtain approval from at least one "impaired" class. This Court has now denied the petition for a writ of certiorari in *Boston Post Road*, and the Second Circuit's decision in this case, which is unpublished and may not be cited as authority under the Second Circuit's rules (*see* A4); is of no precedential effect; adds nothing to the holding previously allowed to stand unreviewed by this Court in *Boston Post Road*; and is of insufficient importance to merit plenary review by the Court.

2. OTS argues that this Court should issue a writ of certiorari to resolve the purported conflict between the Second Circuit and other Courts of Appeal listed above, and the decision of the Seventh Circuit in *In re Woodbrook Associates*, 19 F.3d 312 (7th Cir. 1994). *Woodbrook* does indeed contain a discussion suggesting that the separate classification of an undersecured mortgagee's non-recourse

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[4] In so holding, the Second Circuit followed these prior decisions of its sister circuits: *In re Jersey City Medical Center*, 817 F.2d 1055 (3d Cir. 1987); *Travelers Ins. Co. v. Bryson Props., XVIII (In re Bryson Props., XVIII)*, 961 F.2d 496 (4th Cir.), *cert. denied*, __ U.S. __, 113 S. Ct. 191 (1992); *Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III)*, 995 F.2d 1274 (5th Cir. 1991), *cert. denied*, __ U.S. __, 113 S. Ct. 72 (1992); *Teamsters Nat'l Freight Indus. Negotiating Comm. v. U.S. Truck Co. (In re U.S. Truck Co.)*, 800 F.2d 581 (6th Cir. 1986); *Hanson v. First Bank of South Dakota, N.A.*, 828 F.2d 1310 (8th Cir. 1987); *Olympia & York Florida Equity Corp. v. Bank of New York (In re Holywell Corp.)*, 913 F.2d 873 (11th Cir. 1990).

deficiency claim is *mandatory* under the Bankruptcy Code, regardless of the debtor's intent to "gerrymander" voting on its plan of reorganization. However, there is no compelling reason in this case for resolving this "conflict" between the circuits because (1) the discussion in *Woodbrook* is technically *dicta*, since the Seventh Circuit affirmed the denial of confirmation of the debtor's plan of reorganization on other grounds and (2) this is not the typical case of conflicting circuit court authority because no fewer than seven of the twelve courts of appeal have held that creditor classification for the purpose of "gerrymandering" voting on reorganization plans is impermissible under the Bankruptcy Code. In this context, the Seventh Circuit decision in *Woodbrook* is clearly aberrational, and its precedential value will in all likelihood be limited to that single Circuit. To the extent that future panels of the Seventh Circuit feel obliged to follow *Woodbrook*'s *dicta*, this Court, should it so desire, will have the opportunity to resolve the conflict in an appropriate future case arising in that Circuit.

3. This case, however, is clearly *not* an appropriate vehicle for resolving the purported conflict between the Seventh Circuit and the seven other circuits, for the simple reason that OTS did *not* employ the classification scheme that the Seventh Circuit suggested was mandatory under the Bankruptcy Code. The Plan which the Debtor presented to the bankruptcy court did *not* separately classify the Bank's undersecured deficiency claim from the general class of unsecured general creditors, as OTS now argues is required by the *Woodbrook* decision. Instead, OTS separately classified the two signage companies' claims, arguing unsuccessfully that their "unique" continuing interest in the future operation of the One Times Square property justified their separate creditor status. It was only after the bankruptcy court rejected OTS's arguments and found, as a factual matter, that OTS's only motive for separately classifying the

signage companies was to gerrymander the confirmation voting that OTS brought forward its Alternative Plan, separately classifying the Bank's deficiency claim. However, as discussed above, OTS never obtained a ruling from the bankruptcy court on whether the Alternative Plan was confirmable, and no evidentiary hearing was even held to determine whether, as OTS now claims, the Alternative Plan in fact corrected any of the three fatal defects the bankruptcy court identified in the original Plan. This Court should not adjudicate whether the Alternative Plan complies with the requirements of the Bankruptcy Code, when the issue of whether the Alternative Plan can be confirmed has not even been tried by the bankruptcy court.

4. Not only does this case fail to present squarely the issue of whether a mortgagee's undersecured deficiency claim must be separately classified, but granting a writ of certiorari would unfairly prejudice the Bank, whose efforts to foreclose on its mortgage have already been delayed for over three years, without raising any realistic prospect that OTS will ultimately obtain relief from the bankruptcy court's decision to lift the automatic stay. The Bank has noticed a foreclosure sale for January 24, 1995, so this case will become moot unless this Court or the Second Circuit issues a stay of that sale. Any stay application, however, would raise the issue of OTS's probability of success on the merits, not only on the classification issue, but on the ultimate issue of whether the bankruptcy court abused its discretion in lifting the automatic stay, after the bankruptcy court had found that the Debtor's original Plan violated the Bankruptcy Code on not one, but *three*, independent grounds. Although the lower appellate courts found it unnecessary to consider any issue but classification, the bankruptcy court's holdings that the Plan was not "fair and equitable" and that the Plan violated the "absolute priority" rule were more than adequate to sustain its decision to lift the automatic stay, even assuming *arguendo*

that the bankruptcy court and the lower appellate courts erred in rejecting OTS's classification scheme. This, then, is not an appropriate case for the issuance of a writ of certiorari because OTS would not be entitled to relief from the bankruptcy court's order lifting the stay even if this Court granted certiorari and reversed the lower courts' decision on the classification issue raised in OTS's petition.

5. Finally, there is no merit in OTS's argument that this Court should issue a writ of certiorari to consider whether separate classification of the signage companies is justified by "overriding legitimate reasons." As indicated above, the bankruptcy court expressly found, as a factual matter, that OTS's classification scheme served *no* legitimate purpose, and the lower appellate courts affirmed this finding as not clearly erroneous. Obviously, this Court ought not exercise its jurisdiction merely to review alleged errors in the lower courts' factual findings.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN S. KINZEY*
JOHN P. CAMPO
TIMOTHY W. WALSH
LEBOEUF, LAMB, GREENE &
MACRAE L.L.P.
125 West 55th Street
New York, New York 10019-5389
(212) 424-8000

**Counsel of Record for Respondent*
Banque Nationale de Paris

Dated: January 19, 1995